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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 56

AMERICAN FEDERATION OF LABOR,
JOHN FITZPATRICK,
CHICAGO FEDERATION OF LABOR, ET AL.,
Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

Brief on Behalf of Respondents.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

EUGENE W. SCHOFLER,
Of Counsel.

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Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

Brief on Behalf of Respondents.

MAY IT PLEASE THE COURT:

Jurisdiction in this Court was invoked and certiorari was allowed under Section 237(b) of the Judicial Code (USCA, Title 28, Sec. 344).

It is asserted and charged by petitioners that certain restraining provisions (but not all) of a final decree entered in the cause as affirmed by the Supreme Court of Illinois, are void on their face; it being contended that the injunctional provisions complained of defy the "liberty" of "freedom of speech" as protected and guaranteed by the "due process" clause of the Fourteenth

Amendment to the Constitution of the United States. The opinion of the Supreme Court of Illinois is officially reported in 372 Ill. 91. This opinion also appears in the record filed in this Court (Rec. p. 24).

We take the liberty of referring to the parties as they appeared in the state courts—petitioners as "defendants," and respondents as "plaintiffs." Italics are supplied unless otherwise noted.

Questions Presented.

The case is brought to this Court from the Supreme Court of Illinois. The proceedings were commenced in the state *nisi prius* court by a complaint in chancery filed by an employer, *with whom all of his sixteen employees* (all women) *joined as plaintiffs.* The basis of the complaint against the defendants was that though none of the employees were members of any of the trade union defendants and although the employer did not refuse to enter into a closed shop agreement (providing his employees would become members of the trade unions, which it is charged the employees refused to do) the defendants (the trade union representatives, officials and the trade unions) called the usual strike and caused the employer's premises to be picketed by pickets who were neither previous nor present nor expectant employees and who were total strangers to the employer and employees. These pickets walked to and fro on the sidewalk in front of and close to the place of business, and passed the entrance to the place of business, carrying banners on which legends appeared charging that the employer was unfair to union labor and to the defendant trade unions. In addition thereto, the complaint asserts that the pickets threatened customers and that the union officials were maintaining, aiding and abetting a secondary boycott.

ıe defendants filed answers to the complaint. By these
vers they justified their conduct by asserting that their
ities were protected by the State Anti-Injunction Act
. 2a, Chap. 48, Ill. Rev. Stat. 1939). They contended
this Act (theretofore construed by the State Supreme
t as being a prototype of Section 20 of the Clayton
of Congress of 1914) which prohibited the Illinois
ts from issuing injunctions against peaceful picketing
the carrying of banners, properly construed, was ap-
ble to their activities in the case at bar.

ıe trial court sustained a motion to dismiss the com-
nt, based upon this contention, and accordingly dis-
ed a temporary injunction theretofore issued. The
rmediate Appellate Court construed the Anti-Injunc-
Act as applying in its restrictive provisions solely to
paigns and activities of trade unions by the strike,
eting, etc. where employees of a plant who were mem-
of a trade union were participating in the contest
seeking to better their employment conditions, hours,
es, etc.; that it appearing from the complaint filed
none of the employees of the employer were either
bers of a trade union or were themselves complaining
eeking to better their own wages and working condi-
s, but to the contrary were well satisfied and not com-
ning, that the Act, properly construed, did not offer
asserted protection. The court further stated in its
ion that under the substantive law of the State of
ois the ultimate purpose of the trade unions was un-
ful; that therefore the ultimate objective being unlawful,
neans used (the picketing, etc.) in carrying out such
wful objective were equally unlawful.

ased upon this opinion, the trial court's order dismiss-
the complaint was reversed. On appeal to the Supreme
rt of Illinois (the court of last resort) the decision
opinion of the Appellate Court was sustained and the

reversal order was affirmed (Rec. p. 24). Thereafter, the Appellate Court (having before it a record which included the complaint, the answers of the defendants, its own opinion and the opinion of the Supreme Court of Illinois) and in accordance with the Civil Practice Act of the State of Illinois, entered a final decree (Rec. p. 36). The defendants did not offer any evidence in support of their answers, nor did they seek to compel the plaintiffs to maintain their complaint by proof.

Immediately after the entry of this decree, the defendant sued out a writ of error from the Supreme Court of Illinois and brought the decree and record of the Appellate Court to the Supreme Court. The only errors assigned by them in the Supreme Court were (Rec. p. 39):

(a) That the decree interferes with the freedom of speech guarantees of the due process clause of the Fourteenth Amendment to the Constitution of the United States; and

(b) That the decree interferes with their freedom of speech and assembly, and denies to them the privileges and immunities of citizens of the United States.

The Supreme Court of Illinois affirmed the Appellate Court decree by its order dismissing the writ of error proceeding (Rec. p. 46).

While in the courts of the state, the defendants justified their activities under the Anti-Injunction Act above referred to, they do not complain nor do they here challenge the constitutionality of either the Act itself on its face, or as construed and applied by the Supreme Court of Illinois. Although the assignment of errors filed in the Supreme Court of Illinois in the writ of error proceedings challenges the Appellate Court decree because it is charged that said decree denies privileges and immunities guar-

anteed by the Fourteenth Amendment to citizens of the United States, such claim is not made here and in this Court. We take it that this assignment of errors has been abandoned because the record here does not disclose that the individual defendants are citizens of the United States; (*Hague* v. *C.I.O.*, 307 U. S. 518-523); and that it is conceded by the defendants that the asserted liberty is not one which is protected by the privileges and immunities section of the Fourteenth Amendment. (*Hague* v. *C.I.O.*, 307 U. S. 518.)

Therefore, there is presented to this Court for consideration and determination but one question: Is that part of the decree of the state court which restrains the defendants from picketing and from carrying banners with legends asserting that the employer-plaintiff is unfair to organized labor and to the defendant trade unions void on its face in that it defies the due process clause of the Fourteenth Amendment to the Constitution of the United States? Is this injunctional decree a denial of the liberty of freedom of speech as protected by the due process clause of the Fourteenth Amendment?

STATEMENT.

Because of certain statements appearing in the brief filed by the defendants, wherein attention is called to assertions made in the answers to the complaint filed in the trial court, and inferences are drawn therefrom in the argument, we are compelled at this point to challenge such assertions of fact and the inferences as drawn.

In the Civil Practice Act of Illinois of 1934 which governs and regulates procedure and practice in all Illinois courts, both *nisi prius* and courts of review, it is provided in Section 188 (Chap. 110, Ill. Rev. Stat. of Ill. 1937):

> "No special findings of fact or certificate of evidence shall be necessary in any case in equity to support the decree."

Where the losing party does not preserve and file a certificate of evidence, all presumptions are indulged in favor of the decree; and it is presumed, (even without factual findings appearing in the decree), that the decree is amply sustained by the evidence—he who attacks has the burden of preserving the evidence. (*Sauter* v. *Pickrum*, 373 Ill. 541; *Prudence* v. *Ill. Athletic Club*, 284 Ill. App. 210.)

By Section 216 of the same Act, the reviewing court is given the authority to enter final decrees and to hear evidence if necessary. The decree herein complained of was entered in the reviewing court (the Appellate Court), after that court had reversed the trial court's order dismissing the complaint for want of equity appearing on its face; and after the court of last resort in the State (the Supreme Court) had affirmed the Appellate Court's reversal order. At the time of the entry of the decree there was before the Appellate Court all pleadings filed, including the defendants' answers. These pleadings (and the final decree, both reviewing Court's orders and the opin-

ion of the Supreme Court of Illinois on the first appeal) constitute the entire record filed in this Court. Immediately after the entry of the final decree, the defendants sued out a writ of error from the Supreme Court of Illinois (Rec. p. 39). Upon the issuance of the writ, they made a motion in that court (Rec. p. 41) wherein they ask that the record filed in the court on appeal from the Appellate Court's reversal order (the first appeal) be accepted and treated as part of the record in the writ of error proceedings. In their moving papers, the following appears (Rec. p. 41):

> " . . . In the writ of error here presented, the parties are the same as in No. 25,083, (the first appeal) and the issue here presented is *identical* with that in No. 25083, except that there a temporary injunction was involved, whereas there is here involved an order of the Appellate Court making such injunction permanent. This is therefore a continuation of the same case, and is instituted for the purpose of obtaining a final judgment of this Court with respect to such permanent injunction, which was entered by the Appellate Court in accordance with the mandate issued to that Court by this Court in No. 25083."

By reason of this statement appearing in the moving papers and a further statement appearing in their brief filed in the Supreme Court in the writ of error proceedings (the second appeal) plaintiffs filed a motion in the Supreme Court of Illinois, asking that the writ of error be dismissed (Rec. p. 43). Suggestions were filed in support of the motion. In these suggestions, plaintiffs quoted from what appears in the briefs filed by the defendants in the Supreme Court of Illinois, which quotation is found in the record here at page 44 and is as follows:

> "The writ of error is here presented with knowledge that this court has fully settled all issues of the case in

> a prior review thereof and that the decree entered by the Appellate Court is in compliance with the mandate of this court . . . If this court adheres to the position in *People* v. *Militzer*, 301 Ill. 284, page 287, that issues once decided on review will not be again considered on a second review, a final order in this case may properly dismiss the writ of error on the ground that all issues of the case have been settled on prior appeal and that the decree entered by the Appellate Court is in conformity with the mandate issued to the Appellate Court by this Court."

Therefore, the defendants by their moving papers, conceded and admitted that the issues involved in the second appeal were no different than on the first appeal, and that the entry of a final decree in no way changed these issues. They cannot in this Court take a different position, viz: that the final decree presents issues which were different than the issues presented to the Illinois courts of review on the first appeal involving the preliminary injunction. Therefore, by preserving no certificate of evidence and by offering no evidence in the Appellate Court, it must be presumed (a) that they did not challenge the factual presumptions arising from the decree itself and that they confessed the facts set forth in the complaint; otherwise they would have insisted on proof being made by the plaintiffs in the Appellate Court, or they themselves would have offered challenging evidence in that court; or they would have insisted that the case go back to the trial court for hearing as to the merits; or (b) that the defendants could not make proof of the facts as set up in their answers.

Suffice it to say, therefore, that the decree and presumptions arising therefrom (which presumptions cannot be challenged here in this court) are tantamount to judicial findings of fact, viz: that the facts pleaded in the complaint are true and have been established; and that the state-

ments of fact appearing in the answers have been considered by the court and either found not true or that they were not sustained by the evidence.

Therefore, the statement appearing in defendants' brief (p. 3) which quotes from their answer in substance as follows:

> " . . . more than ninety per cent of some 200 beauty shop operators employed in the area were members of the union; that plaintiff's (Swing's) employees were not members of the union but they were threatened with discharge if they joined the union . . . "

cannot be accepted as either a correct statement of fact or as maintained by the record, when the contrary appears in the complaint (Rec. p. 7).

> "The plaintiff (employer) is informed and believes that there are a large number of beauty shops in the City of Chicago, many of which employ more operators than he employs, whose employees are not members of the trade union; that there never has been nor is there now any picketing done by the defendants or their agents in front of other shop . . . In truth and in fact the plaintiff-employer pays his employees the prevailing wage in the City of Chicago; his employees work under superior conditions in a building considered to be one of the best in the City of Chicago, for a beauty shop business . . . the wages and working conditions in the other shops are lower and not as good as those in his shop." (These statements of fact were affirmed by all of the employees, Rec. p. 9.)

The decree (Rec. p. 38) enjoined and restrained threats, intimidation, violence and the use of opprobrious epithets, in addition to enjoining and restraining so-called peaceable picketing and the libelous statements appearing in the

banners. Therefore, it must be presumed that that part of the decree is also sustained by the record; otherwise the Appellate Court would not have found it necessary or advisable to enjoin threats, etc. in the decree. This part of the decree is sustained by the statements of fact appearing in the complaint, viz: the threatening of two customers and the maintaining, aiding and abetting of a secondary boycott (Rec. pps. 6 and 11). Because they appear in the decree, it necessarily follows that the established facts made it necessary to enjoin such conduct; and it cannot be asserted here and at this time that certain of the statements of fact appearing in the complaint are conclusions of the pleader.

Because of the foregoing and other arguments made in the brief, and although the defendants have not deemed it necessary to give a resume of the pleadings, we deem it advisable at this time to call attention to the following which appears in the complaint (Rec. pps. 1-13):

The bill of complaint was filed by an employer, together with all of his sixteen employees (all women). The pleading states that there was no controversy of any kind between the employer and his employees—much less any existing conflict as to wages, hours or working conditions. It affirmatively appears that the employees were well satisfied with their wages, working conditions and hours, and that none of the employees were members of the defendant trade unions (Rec. pps. 8, 9 and 10).

In the month of April, 1937, organizers for the defendant Hairdressers and Cosmetologists Union, Local No. 548D, called upon the employer, with the request that he enter into a closed shop agreement with them, and employ none but union members (Rec. p. 4). *The employer suggested that he would enter into such relationship providing he would not have to discharge any of his present employees. He further suggested that the trade union of-*

ficials and organizers were at liberty to seek the membership of his employees by talking to them on the premises (Rec. p. 4). *It further affirmatively appears that the organizers did talk to the employees and that the employees refused to join the trade union* (Rec pps. 4 and 8). *Thereupon the union organizers insisted that the employer enter into an agreement with them and either compel the then employees to join the union or discharge them and employ union members* (Rec. pps. 3, 4 and 5). Upon refusal of the employees to join the union and the employer to enter into a closed shop agreement with the union by which he would have to discharge all of his present employees if demanded by the union, and on April 30, 1937, a strike was called and picketing commenced. The pickets were total strangers to both the employer and employees (Rec. p. 5), never having been employed by the employer at any time previous thereto; nor were the pickets expectant employees (Rec. p. 5). None of the employees then employed by the employer-plaintiff went out on strike (Rec. pps. 5 and 6). These pickets carried banners upon which the following legend appeared: "This beauty shop is unfair to organized labor, Hairdressers & Cosmetologists Union Local 548D, American Federation of Labor and Chicago Federation of Labor" (Rec. p. 5). From these legends it appeared that the American Federation of Labor and the Chicago Federation of Labor were taking part in the campaign. In addition thereto, the complaint alleged (Rec. p. 2) that the Hairdressers & Cosmetologists Union held a charter from the Journeymen Barbers International Union; that some of the officials who called upon the employer were officers of said Barbers Union, and that in turn the Barbers International Union held a charter from the American Federation of Labor. It is charged and asserted in the complaint (and the other facts and reasonable inferences drawn from the facts and circumstances as pleaded, and the Supreme Court of Illinois

so found) that these legends were untrue and deliberately libelous, and that the continuous carrying of them established malice and a deliberate attempt to injure the plaintiffs, and therefore constituted a continuing and continuous libel and trespasses.

In addition to the foregoing activities, it is further charged and asserted that a secondary boycott was being maintained, aided and abetted by the defendant trade unions, in that without reason or excuse and immediately after the picketing commenced, the hot water supply which had been constant prior thereto was cut off, (Rec. p. 11); and that the supply of towels delivered by union drivers working for laundry companies was suddenly cut off after the strike started (Rec. p. 12). It further appears from the complaint that two customers were threatened with bodily injury by the pickets (Rec. p. 6).

The Supreme Court of Illinois, in affirming the judgment and opinion of the Appellate Court (Rec. p. 24) declared:

(1). That the ultimate objective of the trade union defendants was not made lawful by the Illinois Anti-Injunction Act; that the Illinois Act as construed by the Supreme Court in the case of *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377, was limited in its restrictive provisions to controversies wherein present employees were, either by themselves or through their trade union representatives, contesting with the employer in connection with wages, hours and working conditions; that this construction of the Anti-Injunction Act was supported by the decisions and opinions of this Court in construing Section 20 of the Clayton Act (of which the Illinois Act was a prototype) and in the cases of *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, and *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184. It was accordingly stated by the Supreme Court of Illinois that based upon the substantive law of the State of Illinois as declared by that

ıd over a period of many years, the ultimate objec-
the trade union defendants in the case at bar was
ıl. The ultimate objective being unlawful, that
aid that it necessarily follows that all the means
attain such unlawful objective are also unlawful
ıld be properly enjoined.

That the liberty of freedom of speech contended
a claim to unbridled license; that it appearing that
ıstitutional rights came into play and conflict in the
was the duty of the court to balance these rights so
ecognize both and keep one from destroying the
and that to sustain the defendants' claims would
in an unlawful destruction of the rights of both the
er and the employees. In the case at bar it clearly
ed that the defendants were guilty of libel and were
to be permitted to continue libeling the plaintiffs,
at therefore the means in and of themselves were
ul and constituted force and were properly enjoined.

That it appearing that the defendants were guilty
y of libel but of threats and maintaining a secondary
, that a court of equity should not be required to
ıd choose, and that the whole scheme was unlawful
uld be enjoined as such.

final decree as entered enjoins and restrains the
ants and persons associated with them from aiding,
g, assisting or participating in doing the things for-
Causes (a) and (b) (Rec. p. 38) enjoins and
ns picketing in front of the place of business and
ing or congregating in front of or in the vicinity of
siness in furtherance of picketing.

e restraining provisions are consistent with the find-
the Illinois courts that the ultimate objective of the
ants' strike campaign was unlawful under the com-
w of the State of Illinois; that the construction
by the Illinois courts upon the Anti-Injunction Act

of Illinois of 1925, to the effect that this Act applied solely to contests in which the then employees of a plant were taking part, and that such act, properly construed, could not apply to "class wars." It will be recalled that the Illinois Act is a prototype of Section 20 of the Clayton Act of Congress. (See *Ossey* v. *Retail Clerks Union*, 326 Ill. 405, and *Fenske Bros.* v. *Upholsterers Union*, 358 Ill. 239); and that this Court in construing Section 20 of the Clayton Act declared that its restrictive provisions applied solely to immediate employer and employee relationships and to contests in which either present or expectant employees took part. (See *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, and *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229). The court of last resort—the Supreme Court of Illinois—in the case of *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377, in enunciating this principle, therefore properly concluded that the ultimate objective in such cases being unlawful, the injury which followed as a matter of course from the campaign cannot be said to be *damnum absque injuria*. If, therefore, the ultimate purpose sought to be attained is unlawful, then it also necessarily follows that the means used to accomplish the objective are equally unlawful and are overt acts in furtherance of an unlawful conspiracy to damage and destroy.

Clause (c) enjoins and restrains the exhibiting or causing to be exhibited any sign or placard or other matter *in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business.*

A mere reading of this clause (c) indicates that it prohibits the carrying of banners only in front of or in the

nity of plaintiff's business, and then only such banners
ch designate the business as being unfair to organized
or or as refusing to permit collective bargaining de-
ied, exhibited and carried for the purpose of inducing
nfluencing persons not to do business with the plaintiff.
s clause neither in and of itself nor read in connec-
with clauses (a) and (b) prohibits the carrying of
ners or the disseminating of information anywhere else
he community other than in front of or in the vicinity
he place of business. Standing alone it merely enjoins
restrains, what the complaint charged and the decree
nd to be, an accomplished and continuing libel, and could
perly be restrained under the common law of the state
an accomplished and continuing trespass. This pro-
on of the decree does not prohibit the defendants from
ing any statements, either presently or in the future,
anywhere else in the community as to the truth of the
est between the trade unions and the employees or the
loyer. It does not prohibit them from saying that the
loyees refused to join the union and that the employer
sed to sign the contract because his employees refused
oin the union. This clause, even considering all other
raining clauses of the injunctional decree as being a
thereof, does not prohibit the trade union from picket-
or patrolling in front of either the employer's or the
loyees' homes; and permits the carrying of banners,
sing of the truth; nor does it prohibit the trade union
n advertising the truth in the newspapers or over the
o. The Chicago Federation of Labor, which is one of
defendants in the case, maintains and operates a large
o station in the City of Chicago, bearing the call letters
FL; the dissemination of trade union propaganda over
radio has been upheld by the Illinois Appellate Court.
Leitzman v. *Radio Broadcasting Station*, 282 Ill. App.
) Both the American Federation of Labor and the Chi-
Federation of Labor publish newspapers which are

circulated throughout the City of Chicago. Nothing in this decree prevents them from making any truthful statements as to the plaintiffs, both the employer and the employees, in their newspaper columns.

Clause (d) (Rec. p. 38) prohibits the defendants from "soliciting, inducing or attempting to induce or influence persons, employees or prospective employees of plaintiff *not to enter his place of business or do business with him.*" Neither this clause nor any other provision of the injunctional decree restrains and prohibits the defendants from obtaining membership applications from either the present employees or from prospective employees of the plant or from any other persons employed or about to be employed in the industry. Nothing therein prohibits or prevents the union from holding meetings anywhere other than in front of the place of business, and for the purpose of obtaining members. All that clause (d) prohibits is the maintaining of a primary boycott against the plaintiffs, to-wit: soliciting or inducing people not to enter the place of business or do business with the employer; the defendants are not enjoined and restrained from calling at the homes of the present employees and there seeking by any method short of threats or intimidation to obtain membership in the trade union.

Clauses (e), (f) and (g) (Rec. p. 38) restrain violence, threats, etc. Certainly the defendants cannot and they do not here complain of these restraints; neither do the defendants complain here of the construction placed upon the Anti-Injunction Act of 1925 by the Illinois courts. Their sole complaint is addressed to the declaration of common law appearing in the opinion of the Supreme Court of Illinois.

SUMMARY OF ARGUMENT.

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT CONFER AN ABSOLUTE RIGHT TO STRIKE.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.

Schenck v. *U. S.*, 249 U. S. 47.

Truax v. *Corrigan*, 257 U. S. 312.

Fiske v. *Kansas*, 274 U. S. 380.

Dorchy v. *Kansas*, 272 U. S. 306.

Stromberg v. *California*, 283 U. S. 359.

Near v. *Minnesota*, 283 U. S. 697.

Grosjean v. *American Press Co.*, 297 U. S. 233.

National Labor Relation Board v. *Jones & Laughlin*, 301 U. S. 1.

Senn v. *Tile Layers Union*, 301 U. S. 468.

Lovell v. *Griffin*, 303 U. S. 444.

Hague v. *C. I. O.*, 307 U. S. 518.

Thornhill v. *Alabama*, 310 U. S. 88.

Cantwell v. *Connecticut*, 310 U. S. 296.

Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939.

Norris-LaGuardia Act, Sec. 102, Chap. 6, 29 U. S. C. A.

National Labor Relations Act, Sec. 151, Chap. 7, 29 U. S. C. A.

(a) The Fourteenth Amendment does not operate as a restraint upon the inherent power of the state to regulate and control the social and economic destiny of its citizens. Labor disputes involve internal, social and economic problems of the state; (except where the power to regulate or control is granted to the federal government by the Constitution of the United States, either by direct grant or as an incident to the exercise of granted power).

Schechter Corp. v. *U. S.*, 295 U. S. 495.
Carter v. *Carter Coal Co.*, 298 U. S. 238.
Senn v. *Tile Layers Union*, 301 U. S. 468.
Lauf v. *Shinners*, 303 U. S. 323.

(b) Assuming that the judgment of a state court, enunciating the common law of the state, can be considered as a declaration of state policy and analogous to a state statute, the declaration of policy in this case is not an unreasonable or arbitrary exercise of state sovereignty.

Nebbia v. *New York*, 291 U. S. 502.
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379.
National Labor Relations Board v. *Jones & Laughlin*, 301 U. S. 1.
Minersville School District v. *Gobitis*, 310 U. S. 586.
Sec. 15; 198-215, Chap. 48 Ill. Rev. Stat. 1939.

(c) The objective sought to be attained by the trade union having been declared to be unlawful, the means used —the strike campaign, the picketing and patrolling—are necessarily unlawful as being a part of a conspiracy to damage and injure and in aid of an unlawful objective.

Aikens v. *Wisconsin*, 195 U. S. 194.
American Steel Foundries v. *Tri-City Council*, 257 U. S. 184.

Dorchy v. *Kansas*, 272 U. S. 306.
Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.
Frankfurter & Greene, "The Labor Injunction," p. 25.

(d) The due process clause does not grant an unbridled license to speak. The liberty of freedom of speech as declared by the First Amendment is not absolute. It is always subject to the exercise of governmental regulation and control in the interest of public welfare. This is emphasized by the due process clause of the Fourteenth Amendment which by its very language recognizes the power of the state to deprive citizens of liberty and property, and even life, if done in the reasonable exercise of police power.

Senn v. *Tile Layers Union*, 301 U. S. 468.
Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.

(e) This case involves private parties; each side is seeking to further its own economic well being and is distinguishable from an attempt on the part of the state to pass and enforce penal laws. The clear and present danger rule should not be the test.

Abrams v. *U. S.*, 250 U. S. 616.
Near v. *Minnesota*, 283 U. S. 697.

II.

THE LIBERTY OF FREEDOM OF SPEECH AS EXPRESSED IN THE FIRST AMENDMENT OFFERS FREEDOM ONLY TO THE SPEAKING OF THE TRUTH. THERE IS NO CONSTITUTIONAL PROTECTION OF SPEAKING OR PUBLISHING FALSEHOODS, SLANDER AND LIBEL.

First Amendment to the Constitution of the United States.

Fourteenth Amendment to the Constitution of the United States.

Near v. *Minnesota,* 283 U. S. 697.

Palko v. *Connecticut,* 302 U. S. 319.

Minersville School District v. *Gobitis,* 310 U. S. 586,

Thornhill v. *Alabama,* 310 U. S. 88.

Schofield, "Freedom of the Press in U. S." 9 Proc. American Sociol. Soc.

"Letters and Writings of James Madison," Vol. 4, p. 542.

(a) Court judgments and decrees cannot be said to place previous restraints on publishing and speaking.

Near v. *Minnesota,* 283 U. S. 697.

(b) This Court has said that the freedom of speech guarantees of the First Amendment are fundamental and have become part of the Fourteenth Amendment protection of liberty, by a process of absorption. The First Amendment by its very language restrains only the "Congress of the United States." The absorptive process cannot be construed as enlarging the scope of the liberty.

First Amendment to the Constitution of the United States.

Palko v. *Connecticut,* 302 U. S. 319.

Thornhill v. *Alabama*, 310 U. S. 88.

Minersville School District v. *Gobitis*, 310 U. S. 586.

Mott, "Due Process of Law," 1925 Ed., p. 276.

Payne, "The Constitution of the United States," p. 45.

Warren, "The New Liberty under the Fourteenth Amendment," 39 Harv. Law. Rev., p. 431.

III.

THE FOURTEENTH AMENDMENT GUARANTEE OF PROTECTION OF FREEDOM OF SPEECH DOES NOT PROTECT THE USE OF FORCE.

Aikens v. *Wisconsin*, 195 U. S. 194.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.

Near v. *Minnesota*, 283 U. S. 679.

Senn v. *Tile Layers Union*, 301 U. S. 468.

Thornhill v. *Alabama*, 310 U. S. 88.

Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.

Charles O. Gregory, "Peaceful Picketing and Freedom of Speech," American Bar Journal Issue, Sept., 1940.

(a) The finding of the state court as expressed in an opinion of the Supreme Court of Illinois that the facts of the case bespeak of an accomplished and continuing trespass, viz: libelous legends appearing on the banners, threats and intimidation, is binding on this Court. The further statement of law, to-wit: that the courts of equity will not pick and choose but will enjoin the whole scheme, is equally binding. Therefore, defendants' conduct epitomizes force

and is not protected by the due process clause of the Fourteenth Amendment.

Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.
Senn v. *Tile Layers Union*, 301 U. S. 468.
Lauf v. *Shinners*, 303 U. S. 323.

(b) The Fourteenth Amendment does not undertake to control the power of the state to determine by what process legal rights may be ascertained or what remedies should be provided to protect and enforce such legal rights. It offers protection only to the end that the litigants are afforded reasonable notice and a fair opportunity to be heard in the courts of the state.

Honeyman v. *Hanan*, 302 U. S. 575.

CONCLUSION.

Truax v. *Corrigan*, 257 U. S. 344.

ARGUMENT.

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT CONFER AN ABSOLUTE RIGHT TO STRIKE.

Although there may be some inferences drawn from the argument made by the defendants in their brief to the effect that they are contending for the absolute right to conduct a strike campaign by picketing, etc., and that such absolute right is protected by the due process clause of the Fourteenth Amendment, we cannot believe that they seriously contend that the Fourteenth Amendment confers such absolute right. (*Dorchy* v. *Kansas*, 272 U. S. 306.) It has always been said by this Court that the right to carry on business, be it called liberty or property, is entitled to protection by the Constitution of the United States. Accordingly, this Court has said that interference with this liberty or property right without just cause is unlawful. (*Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418; *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184; *Truax* v. *Corrigan*, 257 U. S. 312; *Dorchy* v. *Kansas*, 272 U. S. 306.)

The complaint was filed in the *nisi prius* court of the state by an employer, together with all of his sixteen employees as plaintiffs. This complaint bespeaks of an attack made by the defendant trade unions and their officials, with the immediate objective of forcing and compelling the employees to join the trade union. It will be recalled that the trade unions first approached the employer with

the request that he enter into a closed shop agreement. This he agreed to do, providing his employees (not one of whom was a member of the union) would become members of the particular trade union. At his suggestion, the trade union organizers urged their cause to all of the employees and on the business premises. When the employees and each and every one of them refused to join the union and after the trade union insisted that, in spite of their refusal, he sign a closed shop agreement and employ none but union members, and if his employees persisted in their refusal to become members, that he discharge them, then and then only did the employer refuse to enter into contractual relationship with the trade unions (Rec. p. 4). This statement of fact is made not only by the employer but is confirmed by the employees (Rec. p. 8). Immediately thereafter a strike was called and the trade unions commenced picketing the business premises. All of the employees continued to work; the entire picket line was composed of strangers to the employer and employees—none of them were either past or expectant employees—certainly not one of them was a present employee. In addition to the patrolling, the pickets carried banners upon which legends appeared, falsely charging the employer with being unfair to the cause of union labor and to the defendant trade unions; and further charging him with refusal to permit collective bargaining (Rec. p. 5). On May 15, 1937, two customers who had had work done in the beauty shop were accosted and threatened by the pickets (Rec. p. 6). The pickets and union sympathizers congregated in front of the premises and made ingress and egress difficult (Rec. p. 7). A secondary boycott was being maintained, aided and abetted by the defendants, in that the hot water supply needed in the business, which was always available and constant prior to the date of the picketing, was suddenly greatly diminished and at times completely stopped (Rec. p. 11);

towel supplies which were always amply furnished by a laundry company prior to the date of picketing were cut down and became inadequate. The drivers of the laundry trucks were members of a trade union (Rec. p. 12).

Thus this record bespeaks of an immediate objective directed against the employees. Pressure was brought on the employer to force him to compel the employees to join the trade union or discharge them. Suffice it to say, however, that the immediate objective of the strike was to attack the employer and through the employer to force his employees to join the trade union. Of course, we do not lose sight of the fact that if, as a result of the pressure, this objective was attained, the next move and objective would have been to demand a closed shop agreement. Inasmuch as the employer in the first instance evinced a willingness to sign such an agreement, it necessarily follows that if the immediate objective was successful and attained, there would have been no further necessity for the strike campaign.

This attack upon the employees defies what we believe to be the basic American concept of collective bargaining. It must be conceded that this right is based upon the precept that the employees, individually and collectively, are entitled to freedom of action—the free choice to designate agents and representatives to bargain for them and with the employer—the legal right of the individual, freely and without restraint of any kind, either from the employer or from the trade union to designate the trade union as his bargaining agent. If it is morally wrong and violative of the constitutional concept of freedom of action for the employer to bring pressure on the employees, to the end that the employee should be free to determine whether or not he would become a member of a trade union, it is equally immoral and undemocratic for the trade union to exercise force and pressure to compel the employees to join the trade union,

or a particular trade union. We respectfully submit that the American concept has always been the watchword, "free choice by the employee." This is best epitomized by the policy declared by the Federal Congress in both the Norris-LaGuardia Act of 1934 and the National Labor Relations Act of 1935.* Several of the states passed legislation similar and sometimes containing identical language as appears in the Norris-LaGuardia Act, including the statement of policy. The Labor Relations Act of the State of Wisconsin containing this statement of policy was declared not to be violative of the Fourteenth Amendment by this Court in *Senn* v. *Tile Layers Union*, 301 U. S. 468.

Consistent with this basic precept of "free choice" on the part of the employees, the Illinois legislature passed the act commonly known as the Anti-Injunction Act of 1925 (Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939). While this act by its language addressed itself to a restraint upon the jurisdiction of the chancery courts of Illinois, it was

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* Section 102, Chap. 6, 29 USCA (Norris-LaGuardia Act).

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual ability of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives, of his own choosing,* to negotiate the terms and conditions of *his* employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives

ared by the Illinois Supreme Court that the effect of language was to make lawful the peaceable activities picketing, patrolling, etc., when done or participated by present employees. (*Fenske Bros.* v. *Upholsterers on,* 358 Ill. 239). When the trade union involved in case of *Meadowmoor Dairies* v. *Milk Wagon Drivers' on,* 371 Ill. 377, and also in the case at bar, sought pro- ion of the Anti-Injunction Act in campaigns directed narily against the employees, to compel them to join le unions, then the Illinois courts in recognition of the ept of "freedom of choice," refused to construe the i-Injunction Act as applying to such objectives. This aration of substantive law was not only consistent the common law of the state, as it had been enunciated hat court over a period of many years, but was also istent with the opinions of this Court in construing ion 20 of the Clayton Act of Congress of 1914. For Court said that Section 20 of the Clayton Act, prop- construed, confined itself to trade disputes in which

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n self-organization or in other concerted activities for purpose of collective bargaining or other mutual aid protection; therefore, the following definitions of, and ted upon, the jurisdiction and authority of the courts he United States are hereby enacted.

ec. 151, Chap. 7, 29 USCA (National Labor Relations Act).

* * It is hereby declared to be the policy of the United es to eliminate the causes of certain substantial ob- ctions to the free flow of commerce and to mitigate and inate these obstructions when they have occurred by ouraging the practice and procedure of collective bar- ing and *by protecting the exercise of workers of full dom of association, self-organization, and designation epresentatives of their own choosing,* for the purpose egotiating the terms and conditions of their employment ther mutual aid or protection.

See also Gregory, "Peaceful Picketing and Freedom of Speech," American Bar Journal (Sept. 1940) p. 709.

the employees, present and expectant, took part, and not to what this Court called "class wars." (*Duplex Printing Co.* v. *Deering*, 254 U. S. 443.) It is also recalled that the Illinois Anti-Injunction Act was declared by the Supreme Court of Illinois to be a prototype of Section 20 of the Clayton Act. (*Fenske Bros.* v. *Upholsterers Union*, 358 Ill. 239 and *Ossey* v. *Retail Clerks Union*, 326 Ill. 405.) In protecting a "free choice," the Illinois courts have invoked this doctrine of "free choice" where the trade union, as well as the employer, was attacked. (See *Kemp* v. *Railway Workers Union*, 255 Ill. 213; *Carlson* v. *Carpenter Contractors Ass'n.*, 305 Ill. 331; *Carpenters Union* v. *Citizens Committee*, 333 Ill. 225.) Competitors in business were also protected from pressure brought, other than in the usual and accepted competitive practices. (See *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377 and cases cited therein.)

After the Anti-Injunction Act was passed by the Illinois legislature in 1925 and after the decisions of this Court in the case of *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, and *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, and at about the time that the Norris-LaGuardia Act was before the Federal Congress, a concentrated effort was made by the trade unions to amend or add to the Anti-Injunction Act of 1925. The legislature was asked to pass legislation so that trade union activities similar to the campaign in the case at bar would be declared lawful. Ever since 1933 and at each of the four regular sessions of the Illinois legislature held since said date—in 1933, 1935, 1937 and 1939—bills were introduced in our legislature which provided accordingly. Not one of these bills was passed by the legislature.

The issue before this Court involves solely a problem over which the State inherently has control; for this Court

has always said that labor problems involve the social and economic life and destiny of the people of the States and are wholly state problems. (*American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Traux* v. *Corrigan,* 257 U. S. 312; *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Schechter Corp.* v. *U. S.,* 295 U. S. 495; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379.) Accordingly, it has been said by this Court that unless labor problems arise as an incident to the carrying out of powers granted to the federal government by the Federal Constitution, the problem is a state problem, and that neither the Federal Congress nor the Federal courts can interfere with a reasonable exercise of this state police power. (See *Schechter Corp.* v. *U. S.,* 295 U. S. 495; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Lauf* v. *Shinner,* 303 U. S. 323.)

It must be conceded that the employer and all of his employees here were engaged in intrastate business and not interstate commerce. They were rendering beauty services to the women of the community in which the place of business was located and in the City of Chicago. (See *Schechter Corp.* v. *U. S.,* 295 U. S. 495, and *Carter* v. *Carter Coal Co.,* 298 U. S. 238.)

The declaration of substantive law by the Supreme Court of Illinois is binding upon this Court The only question before this Court is whether or no this common law of the State of Illinois is violative of constitutional protection under the restrictive clauses of the Fourteenth Amendment to the United States Constitution (*Senn* v. *Tile Layers Union,* 301 U. S. 468; *Lauf* v. *Shinner,* 303 U. S. 323.)

The defendants contend that the injunctional order must be examined in the same light as if the decree of the Supreme Court of Illinois was a legislative enactment. They contend that this decree on its face is void. They

assert that, on its face, it defies the due process clause of the Fourteenth Amendment and they say that this Court has already committed itself in *Senn* v. *Tile Layer's Union*, 301 U. S. 468. They quote from the opinion (p. 478) wherein in substance it is said that the members of a trade union may, without statutory authority granted by the State, publicize the facts of a labor dispute because freedom of speech is guaranteed by the Federal Constitution. They disregard the sentence immediately following, to the effect that the State has the police power right to regulate the method and means of publicity, as well as the use of the public streets. They have further overlooked the succeeding sentence wherein this Court definitely indicates that the question of constitutional protection of the means used—the picketing, etc.—is dependent upon whether or not the end sought to be attained in a particular strike is lawful.

The liberty of freedom of speech, either under the First or Fourteenth Amendment, has never been said to be absolute, but is always subject to some regulation and control in the interest of public welfare.

While we cannot perceive how, under the federal system, a judgment or decree of a State court can be considered as a declaration of policy distinguished from an interpretation of policy already declared; and therefore upon what basis the Fourteenth Amendment use of the word "state" can be construed to include judgments of a State court in its enunciation of the common law of a State, yet for the moment we assume that this judgment is analogous to a State statute. This Court is not concerned with whether or not a State statute on its face or as construed and applied declares a policy different from the policy declared by the Federal Congress or by the Legislatures of other States. While a variant in policy in the same State is to be considered, yet that in and of itself

is not sufficient to impel this Court to declare state legislation unconstitutional.

The issues involved here are matters which *per se* concern state internal and economic policy. The Fourteenth Amendment does not *per se* deny to the States the right or power to pass legislation dealing and treating with labor problems. The question resolves itself as to whether or not this decree on its face is so unreasonable and arbitrary that judgment must be rendered here declaring the policy to be defiant of the "due process" clause of the Fourteenth Amendment.

Defendants complain in their brief that the policy enunciated by the decree varies from State policy in cases wherein employees are involved in the controversy. They say that such variant is not only unjustifiable, but that it is contrary to the due process clause protection of freedom of speech. We have heretofore suggested that one of the fundamental precepts of the recognition of trade unionism is that it permits and offers "freedom of choice" to the employee to designate some one to bargain for him; that by recognizing the right of a group of employees to collectively appoint one bargaining agent, their rightful position in their economic destiny is preserved.

It will be recalled that all of the courts, including this Court, for many years recognized that the employer had the legal right to bring pressure to bear on the employees to sign what the trade unions termed "the yellow dog contract." State legislation was passed in several States, including Illinois, which made it a crime to induce or assist in the violation of these so-called "yellow dog contracts." As a result of the general condemnation of these contracts, public opinion forced a change in the underlying philosophy. The result is that the Federal Congress and most of the legislatures of the States including Illinois, passed acts declaring such contracts illegal

and void. In Illinois, and in 1933, it was declared by legislation that such contracts were contrary to the public policy of the State and wholly void and unenforcible in the courts of the State. (Sec. 2(b), Chap. 48, Ill. Rev. Stat. 1939). The basis of complaint, as is well known, was that the "yellow dog contract" was a denial to the employee of his constitutional right of "freedom of choice" —that he should not be denied the right to join a trade union if he were of the opinion that his own interests would be best served by so doing. Is compulsion and pressure brought by a trade union for the purpose of compelling the employee to join the trade union to be placed upon a different pedestal? Does this not also deny "freedom of choice" even as the "yellow dog contract"? Should not the employee have the free right to determine for himself whether he wishes to join a trade union or a particular trade union? It will be recalled that in the case at bar the employees refused to join the particular trade union, and gave their reasons therefor. The complaint so states in detail. We recognize that in weighing the needs of society, employees under certain circumstances may be forced to join a trade union or to participate in their activities. But we submit that that is a question of state policy and that the state has the sole right to determine whether or not the welfare of the state will be best served by permitting or refusing to permit general unionization of employees as a class. If trade union force and pressure is to be held lawful and constitutionally protected by this Court and in this case; then we submit that it necessarily follows as the next step that the trade union would have the lawful right to come into the community and say that the trade union deems it for the best interest of the employees of the entire community that each and every one of them should belong to the particular union, and if there is a refusal, to conduct the strike campaign against each and every one of the industrial plants of the com-

nunity and industry as a whole and at the same time. If uch a program is truly for the best interests of the com-nunity, we say that the policy should not be one which omes from the courts, but, as said by this Court in *Miners-ille School District* v. *Gobitis,* 310 U. S. 586:

> "To fight out the wise use of legislative authority in the form of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serve to vindicate the self-confidence of a free people * * *."

If what we have heretofore said does not satisfy the re-uirements of due process, then we say that the statements f this Court found in the opinion of *Senn* v. *Tile Layers Union,* 301 U. S. 468, indicate that this declaration of pol-cy is not unconstitutional. If a State has the constitutional ower to permit a trade union to compel an employer to ease working with his own hands by the strike campaign, hen we say that a state statute which protects the em-loyee and employer from pressure by a stranger union s equally constitutional.

In late years this Court has declared that it is most eluctant to declare State legislation unconstitutional on ts face and without having before it the facts, the contem-orary conditions, social and economic, which impelled the egislature to pass the law. (*Nebbia* v. *New York,* 291 U. S. 02; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; dis-enting opinion of Mr. Justice Brandeis in *Truax* v. *Corri-an,* 257 U. S. 312). This Court has also said that the urden of establishing unconstitutionality is upon him who ttacks; that it is the province and duty of this Court to ave rather than destroy. (*National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1). Defendants have ot attempted to maintain this burden, but to the contrary ssert that judgment should be passed by mere examination

of the decree on its face. While we may rightfully accept this challenge, yet we feel impelled to give to the Court some statistics and factors which we believe enter into the picture.

The History.

The history of the struggle is a matter of common knowledge. Mr. Justice Brandeis, in the dissenting opinion in *Truax* v. *Corrigan*, 257 U. S. 312, beginning at p. 354, gives this history in detail and down to 1921. It will be recalled that Section 20 of the Clayton Act was heralded by the trade unions as being "Labor's Magna Charta." It was thought by the trade unions that Section 20 gave them the green light and that by reason thereof they could compel general unionization of industry. When this Court limited the application of Section 20 to conflicts in which the employees were participants, and not to "class wars," then this Court was accused of throttling the trade union movement by what was termed "judicial legislation." The result was that the State courts following the lead of this Court refused to construe their prototype acts as authorizing general unionization campaigns. In 1932 Federal Congress passed the Norris-LaGuardia Act under which the words "labor disputes" were defined as permitting trade union campaigns and activities, regardless of whether or not the employees of a plant were members of a trade union. By the end of 1939, thirteen States, including Illinois, had passed laws similar to the Clayton Act.[1] Fourteen States (most of which had originally enacted the Clayton Act) enlarged the scope of permissive trade union activities by passing legislation similar to the Norris-LaGuardia Act of 1932.[2] The remaining twenty-one States

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[1] CLAYTON ACT STATES:
Arizona, California, Illinois, Kansas, Maine, Montana, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Wisconsin, Wyoming.

continued to deal and treat with the problems on the basis of their substantive law.

The legislative policy of the State of Wisconsin has always been considered favorable to the trade union movement; likewise the State of Oregan was said to be liberally disposed. In both of these States enactments similar to the Norris-LaGuardia Act were passed almost immediately after the Federal Congress enacted its Norris-LaGuardia Act. The courts of these States, as is evidenced by the decision of the Supreme Court of Wisconsin, quoted from in the case of *Senn* v. *Tile Layers' Union,* 301 U. S. 468, sustained the trade union activities, and made no attempt in any way to construe their acts so as to cut down these activities. However, in both States and in 1939, laws were passed which completely changed the picture. In Oregon, its law was passed by the legislature as the result of a referendum of the people. The people of the State, under their initiative and referendum section of the Constitution, demanded a change in the law. The result is that in Wisconsin and Oregon they now have statutes on their books which restrict trade union activities to the end that neither the liberal provisions of Section 20 of the Clayton Act nor of the Norris-LaGuardia Act are applied. No longer in Wisconsin and Oregon can the trade union call a strike if one or two employees are members of a trade union—certainly no strike can be called if no employee is a member of a union. A strike campaign is unlawful unless a *majority of the employees go out on strike and unless the strike is called concerning matters pertaining to wages, hours and working conditions of the employees directly involved in the controversy.* (Chap. 2, Laws of Oregon, 1939; Secs. 103-535, Wisconsin statutes of 1939).

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[2] Norris-LaGuardia Act States:
Colorado, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington, Wisconsin.

In Illinois, the Anti-Injunction Act which in effect mad lawful, peaceful picketing, patrolling and the carrying o banners, when done as part of a campaign in which some o the employees—no matter how few—are directly inte ested, was passed in 1925. Beginning with the bienni session of the legislature in 1933 and at each session o our legislature in 1935, 1937 and 1939, the trade union have brought about the introduction of bills under whic trade union activities were permitted to be expanded, as i the Norris-LaGuardia Act. Our legislature has refuse to pass the proposed legislation.[2a] The legislature of thi State was in session in 1939 at the time that the Suprem Court of Illinois rendered its opinion in the case of *Me dowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Il 377, and in the case at bar. An immediate effort was mad at that session to bring about the passage of a bill whic would make lawful the conduct and activities condemne by these decisions. The legislature again refused to pas such a bill.

Thus the history rightfully can be said to be an epitom of experience. If the people of the State of Oregon an within the last year demanded a change in the law whereb the right to strike was limited to (a) individual plant and solely to disputes concerning matters pertaining t wages, hours and working conditions of employees directl involved; and (b) only where a majority of the employee are out on strike; and if the legislature of Wisconsi deemed it necessary in that State to pass similar legisl tion; and if in the State of Illinois the legislature as late a 1939 and after the decision of its court of last resort in th case at bar, saw fit to refuse to pass the enlarging legisl

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[2a] Senate Bill 396, House Bill 598 (1933).
Senate Bill 98, House Bill 138 (1935).
Senate Bill 22, (1937).
House Bill 97 (1939).

tion asked for by the trade unions, then we believe we have the right to say that those charged with responsibility of declaring a policy have deemed it wise and necessary in the interest of their own citizens in two instances to restrict and limit, and in one instance to maintain the status quo.

From this history it is apparent that there is no unanimity of opinion amongst the States, and that insofar as the States are concerned they are still going through a period of trial and error.

Economic and Social Conditions.

Illinois is the third or fourth largest industrial community in the country; the City of Chicago is the second largest city in the United States. It is only natural that in a State containing such a large community, the economic and social problems are different than in the agricultural States. In and around the City of Chicago we have witnessed some of the most violent strikes. (See "Dynamite," by Louis Adamic, 1935). It is common knowledge throughout this country that building activities have been retarded in the City of Chicago, due largely to jurisdictional disputes between trade unions. The public press in the past few years has been full of articles pertaining to labor conditions in Chicago. (See "American Labor Struggles," by Samuel Yellen, 1936). The Chicago press and the press throughout the country has contained new items and articles charging that racketeers, gangsters and criminals have taken over control of some of the trade unions. See Thurman Arnold "Bottlenecks of Business," p. 243.

It must be recognized and conceded that, by virtue of the National Labor Relations Act (the Wagner Labor Act), the Wages and Hours Act of the Federal Congress, the decisions of this Court construing the first act, in *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, and in other cases,

by far and large the major part of persons gainfully employed in industry in the United States and the labor relations, between them and their employees, are governed, regulated and controlled by the foregoing Congressional legislation. Thus, labor relations in the main have been transferred from the States to the Federal government. The States have left to them the power to regulate and control only those labor activities which fall within what is today a narrowed definition of intrastate commerce—the business of the middleman,—the broker, the butcher, the grocer and the like. Thus, and as a result, more than 50% of all persons gainfully employed who are eligible to trade union membership are subject in their labor relations to the control of the Federal government. Of approximately 22,000,000 persons employed in the United States who are eligible for trade union membership under trade union by-laws (as shown by the last available statistics) 12,500,000 are engaged in interstate commerce; approximately 10,000,000 in intrastate endeavors.[3] According to the census of business found in the statistical abstract of the United States, based upon the census of 1930 (Census of Business 1935, Tables A and 3, Vol. 5) in 1935, there were approximately 8,000,000 persons engaged in domestic personal service and professional activities. According to Prof. Douglas in his article "The Iron Age," issue of April 6, 1939, there were, as of that date, approximately 1,300,000 persons engaged in business in the United States employing less than nine people. These perforce are the small business man and the operators of small establishments doing intrastate business. It is common knowledge that these employers, and certainly those in the personal ser-

[3] "Report of Executive Council A. F. of L. to the 57th Annual Convention," Denver, Colo. (Oct. 4, 1937) p. 10; Elsie Gluck, "Introduction to American Trade Unionism," 1937 Supp. Additional figures—C. R. Daugherty—"Labor Problems in American Industry," 1933, p. 499.

vice and professional activities, are able to exist only because they themselves do part of the work. It is also common knowledge that trade unions as a general rule, and by their by-laws, neither permit such employers to become trade union members, nor do they permit the owner to labor in a unionized plant.

By reason of the National Labor Relations Act and other similar legislation, the trade unions can, and do see to it that cases are brought or defended in courts of the United States. There, the Norris-LaGuardia Act and the restraints on equity jurisdiction and procedure provided for therein come into play. The trade unions, by reason of the definition of "labor dispute" found in the Norris-LaGuardia Act, have been able to conduct general unionization campaigns in the major part of the industrial plants of the country. This has been a boon to the expansion of trade union membership and trade union membership has grown by leaps and bounds throughout the country. A typical example is the following: the President of the United States, on September 11, 1940, in an address delivered before the convention of the International Brotherhood of Teamsters, (held in the City of Washington), made the statement that the membership of this union had grown from 70,000 in 1933 to 500,000 in 1940—an increase of over 700%. At the end of 1938, the five large national unions and their affiliates claimed a membership roll of 9,100,000, which represented approximately 41% of all gainfully employed people in the United States who were eligible to trade union membership.[4] Over a period of three years

[4] "Report of Executive Council A. F. of L., 58th Annual Convention," (Oct. 3, 1938) Houston, Texas; "Report of John L. Lewis to First Constitutional Convention of C.I.O." (Nov. 14, 1938) p. 11—covering a period from the Organization of the C.I.O. to November 1, 1938.

Woytinsky—"Labor in the United States," 1938, chart. p. 308-311. It will be noted that this chart is based upon

from 1934 to 1937 trade union membership in these five unions increased by 4,000,000; over a period of six years and from 1931 to 1937 the membership roll increased by approximately 6,000,000.[5] In 1931 the trade unions represented approximately 9% of the people gainfully employed

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the official "Report of the United States Census Bureau for the 1930 Census."

The figures quoted above are an estimate giving due regard to the fact that unemployment has increased since 1930. It will be noted that the chart cited shows that the total number of persons gainfully employed in the United States in 1930 was 48,829,920; whereas our figure for 1937 was 40,000,000. The latter figure is taken from an estimate made by Herbert Harris in his book, "American Labor," 1939, p. 359.

It is a matter of common knowledge that the number of persons employed in agriculture, professional work, domestic and service pursuits was greater in 1930 than in 1937. Therefore our percentage figures that follow represent an extremely conservative conclusion. Since these figures are estimates we attempt to be as conservative as possible.

[5] Harris, "American Labor," 1939, p. 359; Gluck, "Introduction to American Trade Unionism," 1937 Supp. p. 96. In October, 1937, total trade union membership was 7,750,000—Gluck op. cit. p. 96. Additional figures show:

Year	Total Persons Employed	Membership in Trade Unions	Percentage of Trade Union Members to Total Persons Employed
1897	26,000,000	447,000	1.4
1910	38,000,000	2,147,200	5.8
1920	42,000,000	5,110,800	12
1930	48,000,000	3,298,000	9
1934	40,000,000	5,000,000	12.5
1939 (Est.)	40,000,000	9,500,000	23

Harris, "American Labor," 1939, chart. p. 359.

It will be noted that the figures used to indicate the number of persons gainfully employed include those persons

and eligible to membership—so that over a period of six years and while industry was going through a depression and suffering tremendous losses, trade union membership increased by 32%.

It is common knowledge that membership dues in a large number of the local unions is in excess of $10.00 per year; in some instances the fees and assessments run in excess of hundreds of dollars per year. The exact income of trade unions from dues and assessments cannot be ascertained since their books and records are not subject to examination by any state, local or federal agencies. Therefore, their income is not generally known. Here and there articles in newspapers have appeared in which it is stated that the income of the trade unions is in excess of $1,000,000,000 per year. It is also common knowledge that it is not unusual practice for trade unions to have initiation fees which run in excess of hundreds of dollars per member.[6]

The annual report of the American Federation of Labor for the fiscal year ending August 31, 1937, published at its convention in that year, shows that its gross income was $1,185,000 for the preceding fiscal year; their balance sheet showed $586,500 cash on hand, of which $533,000 was set aside and allocated for defense purposes. For the fiscal year ending August 31, 1938, the published report showed a gross income of $1,800,000—an increase of $700,000 in cash income over the preceding fiscal year. It was reported that $1,175,000 was spent for organizational purposes; office expenses and loans were $166,800; $150,000 was spent

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engaged in agriculture, professions, domestic and service pursuits. If those persons not eligible to membership in trade unions were omitted from our calculations, it must be recognized that the percentage figures shown would be 41% for 1939.

[6] Prof. Paul H. Douglas, "International Labor Review," March, 1939.

in publishing and circulating its newspaper. This amount represented the cost and expense in excess of gross income.[7]

The Congress of Industrial Organization published a report in which it appears that during the three year period from 1933 to 1935, inclusive, its gross income was $3,500,000; that this total amount was spent during the three year period for organizational activities and purposes of one kind or another.[8]

At the end of 1936, the Brotherhood of Locomotive Firemen and Engineers published a balance sheet showing cash and liquid securities of approximately $25,000,000 on hand. On June 1, 1939, the United Mine Workers of America had $2,877,381.33 in cash and liquid securities on hand. Its income from June 1, 1939, to December 1, 1939, was $1,151,757.90. After deducting expenses and operating costs and on December 1, 1939, there was $2,526,750.49 in cash and liquid securities on hand.[9]

The business involved in the case at bar is known as the beauty shop business. Let us now look at the income figures for the beauty shop business, both in the entire United States and in the City of Chicago. In 1935 there were 61,355 beauty shops operating in the United States; they employed 78,000 people; the average gross annual income per establishment was $2800.00. There were approxi-

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[7] "Report of the Executive Council of A. F. of L." Denver, Colo. (Oct. 4, 1937) pp. 5-9; "Report of the Executive Council of A. F. of L." Houston, Texas, (Oct. 3, 1938). Report of Executive Council of A. F. of L. Convention, pp. 6 and 24 (Oct. 3, 1938) Houston, Texas.

[8] "Report of John L. Lewis to the First Constitutional Convention of C.I.O.," Pittsburgh, Pa. (Nov. 14, 1938) pp. 13, 14.

[9] Pamphlet prepared for the members of the Brotherhood of Locomotive Firemen & Engineers, 1937. Proceedings 36th Annual Convention United Mine Workers of America, Feb. 1, 1940.

mately 2322 beauty shops in Chicago in that year; the average gross annual income of the beauty shop operating in the City of Chicago was $3590.00.[10] These beauty shops were in the main operated by individual operators and were not chain operations.

The ability of the individual beauty shop operator to successfully combat trade union pressure and force is answered by the foregoing statistics.

It will be recalled that in the complaint the employees, all of whom are women, stated that they did not wish to join a trade union because they felt that they were amply protected by the legislation then in force and effect in the State, as to hours, wages and working conditions. They also said that theretofore they had been induced to become members of a local union and that not only did the union fail to offer them any benefits, but that the union remained in existence only a short time and its organizers and officials disappeared, taking with them the contents of the treasury, and they were never heard from since that time (Rec. p. 9).

The Illinois legislature has from time to time passed legislation fixing maximum hours of labor for women (Sec. 5, Chap. 48, Ill. Rev. Stat. 1939). A minimum wage for women is also fixed by the statute and working conditions are prescribed. (Secs. 198 to 215, Chap. 48, Ill. Rev. Stat. 1939.) It must also be presumed that the employees knew in a general way what was the gross income of their employer, and therefore what wage he could afford to pay.

In considering the problem, we must also take into consideration that in 1937 (according to the United States Bureau of Labor, Department of Labor Statistics, Bulletin No. 651, and 46 and 48 Monthly Labor Review) 70% of the strikes in the United States involved unionization campaigns

[10] U. S. Department of Commerce, Bureau of the Census, "Census of Business 1935," Vol. 2, p. 1, 1937.

and miscellaneous issues; 30% wages, hours and working conditions; 58% were strikes for plant or industrial organization. In 1938 72% of the strikes involved organization and miscellaneous issues; 28% wages, hours and working conditions. During the first two months of 1939, 55% of the strikes involved organization and 22% wages, hours and working conditions.

Thus we believe that we have the right to say that no longer is the trade union the weak and undernourished child in the family; no longer does he require the protecting arm of the mother to keep him from being overwhelmed by his brethren. He too has become strong and well able to take care of himself in the struggle for economic existence and well being. It appears to use that the battle should be fought out between the brothers in the family, and that public opinion should be left to determine the issues and problems. Certainly, a national policy which materially affects each and every of the forty-eight States should not be enunciated by a court. All in all considered, we respectfully submit that it has not been demonstrated in the case at bar that the trade union objective here can be constitutionally protected—the declaration of policy of the Illinois courts as evidenced by this decree cannot be said to be an unreasonable and arbitrary pronouncement of the public policy. It certainly must be said that the issue presented is one which resolves itself into a question of wisdom and matters over which this Court has often said it will not concern itself. (*Senn* v. *Tile Layers Union*, 301 U. S. 468.)

It always has been the universally accepted legal doctrine that the strike campaign itself, the picketing, the patrolling and the dissemination of information in a particular case can win immunity only from its purpose—the immediate objective. (See Frankfurter & Greene, "The Labor Injunction," p. 25, and cases cited; *Aikens* v. *Wisconsin*, 195 U. S. 194; *Dorchy* v. *Kansas*, 272 U. S. 306.) If it necessarily

follows that the means used are part of an entire campaign and cannot be separated therefrom, and if the purpose is unlawful, then the means—the campaign used—must be unlawful. *Damnum absque injuria* cannot be held to apply. (See *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377.) Can it be said that the due process clause of the Fourteenth Amendment in protecting freedom of speech and freedom of the press should become a shield and a protection for those engaged in unlawful objectives? We believe not, and we submit that the freedom of speech guarantee can offer protection only where the end is lawful. (*Dorchy* v. *Kansas*, 272 U. S. 306.)

We concede that in this day and age, all civil liberties, and particularly freedom of speech and freedom of the press, must be fortified and strengthened as never before—even perhaps to the end of upholding these rights where they might completely destroy the property right, but we say—the liberty of freedom of speech and freedom of the press cannot be fortified if it is permitted to be used as a screen and a cover up for persons engaged in pursuing unlawful objectives.

We respectfully submit that in each of the cases involving freedom of speech and freedom of the press, decided by this Court since *Gitlow* v. *New York*, 268 U. S. 652, it clearly appears that the parties whose liberty of freedom of speech and freedom of the press were sought to be denied by the State or Congressional legislation, were seeking to protect this liberty in the exercise of lawful pursuits—furthering lawful objectives; or that the legislation attacked did not differentiate between unlawful and lawful objectives, and swept within its ambit and without differentiation, both lawful and unlawful pursuits; or that the reason given for punishing existing evils was not sufficient in the opinion of this Court to warrant a restraint upon the liberty. These cases in the main involve penal statutes making the means

used to accomplish ends, crimes. The pursuits of the defendants in these cases were either lawful *per se* and so recognized in the State, or they were made lawful by virtue of constitutional protection, or the record before this Court, either by silence or by demonstration, warranted the presumption that the objective was lawful by the law of the State.

Thus by the Constitution of the United States, each and every citizen has the inherent right to advocate by peaceful means a change in the form of government. It is only when the advocate seeks to espouse a change by encouraging or inciting force and revolution that the objective becomes unlawful. Therefore, this Court has said that legislation which, on its face, or as construed and applied to the facts of a particular case makes it a crime to advocate the overthrow of government by peaceful methods, creates an unconstitutional deprivation of the liberty of freedom of speech. This has been held and applied to both State and Federal statutes. (See *Schenck* v. *U. S.*, 249 U. S. 47; *Abrams* v. *U. S.*, 250 U. S. 616; *Stromberg* v. *California*, 283 U. S. 359; *Fiske* v. *Kansas*, 274 U. S. 380.)

State legislation which was aimed at putting out of business newspaper publishers who were presumably attacking public officials, by placing an exorbitant tax on circulation, was declared unconstitutional by this Court. It is clear that the tax defied the historical conception of placing previous restraints and was aimed at destroying a lawful business. (*Grosjean* v. *American Press Co.*, 297 U. S. 233.)

A state statute which permitted and authorized an injunctional order, under the theory of the abatement of a nuisance by permitting law enforcing officers to stop the publication of charges against public officials by putting the publisher out of business, also defied the historical conception of freedom of speech. (*Near* v. *Minnesota*, 283 U. S. 697.) In the cited case, the record did not disclose that

the charges were false, and it was properly asserted by this Court that a statute which permitted previous restraints on the publication of truth, and without the necessity of preliminary proof of falsehood, was clearly unconstitutional on its face. Persons engaged in an attempt to discuss the merits or demerits of public laws are certainly following lawful pursuits and basic rights protected by every Constitution in this land. Therefore, a statute which provides for a license, and provides that a public official shall pass judgment upon what may be said at meetings and in public halls, is clearly unconstitutional. (*Hague* v. *C. I. O.*, 307 U. S. 518.) Any legislation which requires the obtaining of a license before publishing or discussing religious practices and precepts interferes on its face with the free exercise of religion and creates a previous restraint, especially where the legislation does not seek to reach fraudulent practices and covers within its ambit lawful dissemination of information on religious subjects. (*Lovell* v. *Griffin*, 303 U. S. 444; *Cantwell* v. *Connecticut*, 310 U. S. 296.) All of the ordinances passed upon in the opinion of this Court in *Schneider* v. *State*, 308 U. S. 147, provided for previous restraints upon lawful pursuits, or at least the statute did not attempt to differentiate between lawful and unlawful objectives. The ordinance of the City of Milwaukee, on its face, did not attempt to control the dissemination of literature where the objective of the trade union was unlawful. The ordinance did not attempt to deal and treat with the subject in this respect, but it covered all distribution of literature on the streets of the City of Milwaukee. The reason given by the State in the record before this Court in defending this ordinance, was that the purpose of the ordinance was to prevent a littering of the streets. This Court was of the opinion that the liberty of freedom of speech required a more persuasive reason for denying the right of the trade unions to spread information with regard to a labor dispute. No challenge was made as to the objec-

tive of the trade union in the particular case. In the light of the right of this Court to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the ordinance, this Court was of the opinion that the reasons advanced were not sufficient to warrant an abridgement of the liberty of freedom of speech.

In *Senn* v. *Tile Layers Union*, 301 U. S. 468, the objective of the trade union was made lawful by the statute of the State of Wisconsin, and declared constitutional by the Supreme Court of the State under its Constitution. This Court was of the opinion that the statute on its face and as construed and applied by the Supreme Court of the State, did not defy the due process clause of the Fourteenth Amendment. Therefore, the objective of the trade union as disclosed by the record before this Court was a lawful objective protected by a constitutional statute of the State. This Court and in its opinion in the case, clearly indicated that the end sought to be attained was lawful; that the means used were lawful, and therefore, unless the means used were of a violent and libelous nature that they were *per se* protected by the constitutional guarantee of freedom of speech.

It is apparent from a reading of the opinions of this Court in *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, that this Court is of the opinion that freedom of speech does not grant an unlimited and an all-embracing right to speak; that the State has the right in the exercise of its police power and within narrow limits to put restraints upon the liberty of freedom of speech in a proper case. It is true that the limits are made narrow, for this Court said in *Thornhill* v. *Alabama*, 310 U. S. 88:

> "* * * The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed

activity, the peaceful character of their endeavor, *the nature of their dispute with an employer,* or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute."

The statutes before the Court in *Thornhill* v. *Alabama,* 310 U. S. 88, and in *Carlson* v. *California,* 310 U. S. 106, on their face and as construed and applied by the State courts, and as disclosed by the record, made it a crime to engage in the lawful pursuit of a strike and perforce the statutes on their face and as construed and applied by the State, did not discriminate between those strikes in which the objective was lawful and those strikes in which the end was unlawful. These statutes were indefinite, and from both a literal reading and a construction placed thereon by the state courts, it clearly appears that the State legislators struck down what were peaceable and lawful means used in attaining lawful as well as unlawful objectives of a strike. All trade union activities were enjoined.

In the case at bar, the decree is narrow in its application and addresses itself solely to the campaign where the objective is unlawful. From other legislation in force and effect in the State, lawful objectives and means used to accomplish them could not be enjoined and restrained. (Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939.)

The decree specifically and explicitly defines the unlawful objective. There can be no question about its language and no one able to read and understand the English language could possibly misconstrue or misinterpret. The punishment is aimed at an elimination of a substantive evil, found to be an evil by the State, and addresses itself solely to a prescribed, limited and declared evil.

We are not unmindful of the fact that this Court, in protecting the liberty of freedom of speech, has taken the

position that if there are two ways of punishing for an abuse of the liberty, one of which will amount to an abridgement of freedom of speech and the other which will not, the second method must be used. This is the argument which is made by the defendants here, but they offer no alternative method. The unlawful activities and campaign cannot be treated with in any other manner than as prescribed by the decree in order to deal and treat with the substantive evil sought to be eliminated. The decree deals with private rights; it recognizes that the attack is made by the trade union at the place at which it can do the most harm and stops the trade union activities at that place. At that place the trade union clearly interferes with (a) the right of the State to control the use of the public streets for the carrying on of lawful objectives (*Senn* v. *Tile Layers Union*, 301 U. S. 416); and (b) the squaring of rights and liberties belonging to the plaintiffs which are protected by the same sentence and section as the liberty of freedom of speech of the defendants is protected by the same constitutional amendment (the 14th Amendment). It must be presumed that the Court had before it and was acquainted with all of the facts and the contemporary economic, social and financial position and condition of the combatants. (This we have heretofore discussed and elaborated upon.)

Without further and extended argument in this regard, we respectfully submit that the punishment for the abuse of the liberty prescribed by the decree is the only method of punishment which can effectively treat with the evil and protect the rights and liberties of the plaintiffs. To say that the plaintiffs have open to it the same public channels, to-wit: the streets in front of the place of business to run counter picket lines or the public press and radio to espouse their cause, would only mean (a) that in fact and in practice, two picket lines would only result in increased congestion by additional crowding of the side-

walk and inevitably to strife and violence and would only have the immediate effect of assisting the trade union in bringing about the damage and destruction which its picket line seeks to do; and (b) that it would compel the plaintiffs to spend their money and await the education of the people and the assertion of public opinion, while their house is on fire and while they are being destroyed. We cannot shut our eyes to what everyone knows is the real object and purpose of a picket line. The picket line is not placed and maintained, in truth and in fact, for the purpose of educating the public. The real purpose and object is (1) by pressure on the customers to bring about a loss in patronage; (2) a cessation of work by putting fear into the hearts of the employees; (3) to find out who is working in the plant so that they can by other ways and means —by the use of the telephone, by talking to the relatives and friends—bring about the leaving of employment; and (4) to bring sufficient force and pressure on the employer and employees, so that they will break down and accede to the union requests and commands. See Gregory "Peaceful Picketing and Freedom of Speech" Amer. Bar Journ. (Sept. 1940).

We have said that this case involves private rights and the record must be approached from this viewpoint. Both parties are seeking, the one to maintain its present financial and economic condition, and the others to likewise better themselves. The case does not involve the usual questions in an industrial dispute—wages, hours and working conditions of present or expectant employees. It is true that it may in a remote sense involve bargaining position somewhere in the remote future, yet the record bespeaks only of the object of increasing the union membership. These statements of fact appearing in the complaint cannot be disregarded. Here the plaintiffs say that there were no employees in the industry and in the neighborhood who were members in the trade union at the time that the strike

campaign was initiated, and that no attack was made on anyone else. Therefore, while we may talk about bargaining position, such bargaining position is far off in the distance and cannot rightfully be considered as part of the case.

The State Supreme Court said, that based upon this record, it became the duty of the Court to square and balance the constitutional rights of both sides of the case; that it became its obligation and duty to protect the plaintiffs' property right and their right of freedom of contract. On the other hand, it recognized the freedom of speech right of the defendants. All these rights were protected by the State Constitution as well as the Federal Constitution, for the State Constitution also contains a Bill of Rights and a section protecting all of its citizens from being deprived of life, liberty or property without due process of law. (Sec. 2a, Art. 2, the Constitution of Illinois of 1870.) But the Supreme Court of Illinois was of the opinion that the defendants were pursuing an unlawful objective and independent of the objectives, were using means which were *per se* libelous trespasses to accomplish that objective; that therefore the defendants were contending for an unbridled license to speak. Therefore, in recognition of these rights, the Court said that both the objective and the means used if permitted to prevail over the property right, would result in a destruction of the plaintiffs' constitutional right and that the defendants were properly enjoined and restrained by the decree. Private libels and private trespasses are not protected by the Fourteenth Amendment constitutional guarantee of liberty of freedom of speech. (See *Near* v. *Minnesota,* 283 U. S. 697.)

The clear and present danger rule does not apply. Mr. Justice Holmes who first enunciated this standard or test in *Schenck* v. *U. S.,* 249 U. S. 47, took occasion in his dis-

senting opinion in *Abrams* v. *U. S.*, 250 U. S. 616 to say:

> "It is only the present danger of immediate evil or an attempt to bring it about that warrants Congress in setting a limit to an expression of opinion, *where private rights are not concerned.*"

Even though it may be said that the present danger test and rule applies, yet this record discloses accomplished trespasses, distinguished from threatened ones—force and pressure—bent upon damage and destruction, which *per se* offers no opportunity t 'est the merits of the conflict by competition for acceptan the market of public opinion. (See *Thornhill* v. *Alabama*, 310 U. S. 88.)

The right of the State to balance constitutional guarantees was recognized by this Court in *Minersville School District* v. *Gobitis*, 310 U. S. 586.

Because this record involves private rights and economic destiny, we respectfully submit that the tests and standards placed and set up by this Court in considering other social and economic legislation, should be applied here. The presumption of validity should prevail; the legislation should not be struck down unless it clearly appears that the decree is unreasonable and arbitrary; the approach should be made from this presumption and not the approach asked for by the defendants, because freedom of speech and freedom of the press may be indirectly involved. (*West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *Nebbia* v. *New York*, 291 U. S. 502.)

We therefore respectfully represent and submit that all in all considered, the trade-unions are seeking protection of the freedom of speech guarantees in their pursuit of an unlawful objective in a purely economic controversy; that the liberty of freedom of speech guarantees of the Fourteenth Amendment cannot and should not be construed as offering protection to persons who are engaged in such unlawful objectives.

II.

THE LIBERTY OF FREEDOM OF SPEECH AS EXPRESSED IN THE FIRST AMENDMENT OFFERS FREEDOM ONLY TO THE SPEAKING OF THE TRUTH. THERE IS NO CONSTITUTIONAL PROTECTION OF SPEAKING OR PUBLISHING FALSEHOODS, SLANDER AND LIBEL.

The decree here limits discussion and dissemination of information at or in the vicinity of the place of business. Clause (d) restrains the carrying of banners with legends appearing thereon which the Court found were libelous and trespasses and maliciously made with intent to injure the plaintiffs, in front of and in the vicinity of the place of business (Rec. p. 28).

The restraints on publication found in clause (d) were therefore restraints on speaking or publishing falsehoods and untruths. The defendants were enjoined from continuing to speak and publish that which the Court found was libelous. There was no restraint placed upon them by this clause (d) against any future statements of the truth or statements other than those specifically enjoined.

Even though it may be assumed that dissemination of information concerning the facts of a labor dispute may be defined as public matters, yet the libels here were private libels. They were declared by the court of last resort of the State not to be threatened but accomplished and continuing trespasses and come within the exception noted by this Court in its opinion in *Near* v. *Minnesota,* 283 U. S. 697, wherein at page 716, it is said:

> "* * * Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."

The restraints here are brought about by a judgment of a court. Courts never deal with the future; judgments and decrees are based upon facts dealing with the present or the past. Court judgments never operate prospectively; they are always considered to operate retrospectively. The judgments and decrees of courts never declare policy. Declaration of policy is a legislative function and the courts, therefore, have been said to be mere interpreters of existing law rather than declarers of future policy. The law enunciated by the courts on matters of substantive law is always subject to change by legislative enactment. Therefore, this decree merely preserves the status quo as it existed immediately prior to the filing of the complaint; it enjoins and restrains only those activities which were carried on at the time of the filing of the complaint and which the Court found to be unlawful, both as to objective and the means used to carry out the objective. Punishment for violating the decree is limited by the terms of the decree and could not extend or operate when there is a change in status of the parties subsequent to the entry of the decree. The court can punish for violation of the decree if the defendants continued to do those acts and things which the decree prohibits. If, for instance, subsequent to the date of the entry of the decree, one of the employees became a member of a trade union there would be a change in status, brought about by new conditions and new facts which would give the trade unions the protection which they seek here by virtue of the provisions of Anti-Injunction of Illinois of 1925. Thereupon, the trade unions could commence a picketing campaign, and such campaign could not be enjoined. No court in Illinois would say that such new change in status could or would constitute a contempt of the court and violative of the present decree. Therefore, we submit that a court decree cannot operate as placing a previous restraint on publishing or speaking within the purview of the Fourteenth Amend-

ment protection of freedom of speech. If the trade union decided to have their members carry banners containing legends which bespeak the truth, such legends could not violate the decree because the decree merely enjoins the speaking of particular falsehoods. Therefore, the injunctional decree cannot be set to operate as a restraint on any speaking other than the speaking and publishing of those matters and things which the Court found to be false and libelous.

In the enforcement of the liberty of freedom of speech, we are concerned with an historic concept. The length and breadth of the freedom must be examined and interpreted in the light of that history. (See *Minersville School District* v. *Gobitis*, 310 U. S. 586.) The Constitution must be examined in the light of the language used; every word must be considered to have been intentionally placed therein. (*Williams* v. *U. S.*, 289 U. S. 553; *U. S.* v. *Butler*, 297 U. S. 155.)

This Court has said that the freedom of speech and of the press are fundamental rights and liberties, and are protected by the Fourteenth Amendment restraint upon States in the same manner and with like effect as the protection afforded under the specific language of the First Amendment and as against the Federal Congress. In *Palko* v. *Conn.*, 302 U. S. 319, at p. 324, this Court has said:

> "... the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress. ...
>
> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the

Fourteenth Amendment *by a process of absorption.* These in their origin were effective against the federal government alone. If the Fourteenth Amendment *has absorbed them,* the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . . This is true, for illustration, of freedom of thought and speech.

"Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. . . ."

In *Thornhill* v. *Alabama,* 310 U. S. 88, this Court again said:

"The freedom of speech and of the press which are secured by the First Amendment against abridgement by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by the State."

In *Minersville School District* v. *Gobitis,* 310 U. S. 586, it is said:

". . . The First Amendment, and the Fourteenth *through its absorption of the First,* sought to guard against repetition of those bitter religious struggles. . . ."

Therefore, this Court is committed to the doctrine that the language of the First Amendment has become part of the Fourteenth Amendment definition of the word "liberty" by a process of absorption.

The following is the language of the First Amendment:

"*Congress* shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."

The words "Congress shall make no law," are clear and unequivocal and need no explanation or interpretation. These words import a definite command and restraint upon the legislature (the Congress) of the United States. This is emphasized by the remaining nine Bill of Rights Amendments. Only in the First is a restraint specifically placed upon the legislative branch of government. The restraints of the other nine Amendments are not limited by their language; they are restraints upon all of the three branches of the federal government.

That it was intended that the restraint shall be upon the legislative branch of the government solely and as it appears from the language of the Amendment, is best epitomized in the statement of James Madison, made in the debates in the Virginia legislature on the Virgina resolutions denouncing the Alien and Sedition law. (See "Letters and Writings of James Madison," Vol. 4, p. 542), wherein Mr. Madison said as follows:

> "In the attempts to vindicate the Sedition Act it has been contended—1. That the 'freedom of the press' is to be determined by the meaning of these terms in the common law. 2. That the article supposes the power over the press to be in Congress, and prohibits them only from *abridging* the freedom allowed to it by the common law.
>
> "Although it will be shown, on examining the second of these positions, that the amendment is a denial to Congress of all power over the press, it may not be useless to make the following observations on the first of them: . . .
>
> "The essential difference between the British Government and the American Constitution will place this subject in the clearest light.
>
> "In the British Government the danger of encroachments on the rights of the people is understood to be

confined to the executive magistrate. The representatives of the people in the Legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, etc.—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this, an exemption of the press from previous restraint, by licensers appointed by the King, is all the freedom that can be secured to it.

"In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.

"The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States."

Nothing is said by Madison as to the restraint upon the courts; nor does the First Amendment provide for a restraint upon the executive branch of government. It is clear, therefore, that it was the definite intention to place a restraint solely upon the legislative branch of government, and that branch of government only, for it was recognized that under the American system of constitutional government the legislature would have the power and could be counted on to protect the people as against restraints created by the executive. Then, too, the Federal Congress and all state Constitutions grant to the Legislatures the power and authority to determine both the original and appellate jurisdiction of the courts of the United States and the states, and, therefore, could be relied upon to limit the jurisdiction of the courts so as to prevent the possibility of the entry of judgments and decrees which would provide for general previous restraints or licenses upon speaking or publishing, all as is evidenced by the Clayton and Norris-La Guardia Acts. It was further recognized that court judgments under the common law could not operate as previous restraints by the very nature of purpose of court decrees which operate retrospectively and not prospectively.

If this case were brought in the courts of the United States (assuming that the courts of the United States had the jurisdiction which the courts of the State of Illinois had at the time of the entry of the decree here) defendants could not successfully contend that the court decree operated as a previous restraint on their right to speak; for they would be met with the argument that by the language of the First Amendment the restraint provided for is one which is applicable by its very language, solely to the legislative department of government and not to the courts. Here, in this case, this Court is

asked to grant the constitutional protection as against a decree of the State court.

We submit that in spite of the fact that this Court has defined the word "state" as it appears in the due process clause of the Fourteenth Amendment as being all-inclusive, *i.e.*, including therein all branches of the state government, that the absorptive process cannot be said to carry with it a widening of scope, and that the Fourteenth Amendment protection of freedom of speech cannot be said to be greater than the First Amendment protection. We submit and urge that the defendants here are asking this Court to perform a legislative function.

This Court is bound by the language as it appears in the Constitution where the language offers neither the necessity or advisability of explanation and construction. The First Amendment, by its language, denies the right of the Federal Congress to pass any legislation dealing and treating with the subject of religion or the free exercise thereof. In the case of freedom of speech the Congress is denied only the right to *abridge* freedom of speech and freedom of the press. The use of the word "abridge" would indicate that there was a well conceived and recognized liberty or right of freedom of speech in existence at the time of the adoption of the Amendment. From a reading of all of the arguments made in favor of the adoption of the Amendment, particularly the arguments made by James Madison, (some of which appear in the opinion of this Court in *Near* v. *Minnesota*, 283 U. S. 697, and included in that part of the discussion on the Virginia Resolutions which we have hereinabove quoted) it would appear that the freedom of speech protected was the right to freely discuss public questions in public places, as well as in the legislatures. These public questions appear to be defined as addressing themselves to the political affairs of the government and the conduct of public officials while

in office. The fight here in America was not so much against previous restraints as against subsequent punishment, for it will be recalled that the doctrine which permitted previous restraints of publication by license or otherwise was declared contrary to the rights of the people and was definitely established in England prior to the time of the adoption of State Constitutions in the thirteen original States. The quarrel was with the statement, "the greater the truth the greater the libel," when public men and public discussions with reference to the administration of office were concerned. By the time of the adoption of the State Constitutions, the English common law and the English Parliament seemed to be committed to an underlying philosophy that it was the "tendency" of the publishing or speaking which controlled; in other words, every man had the right to speak freely or to publish both false and true statements, but the truth was no defense. If the tendency of the truth were to bring parliamentary officials or other public officials into disrepute in the eye of the public, then, even though true, the publisher was guilty of a crime. The question of the "bad tendency" of the publishing or speaking was to be determined by the court; the jury was limited in its deliberations solely to the question as to whether or not there was any publishing or speaking as charged in an indictment. By the Alien and Sedition law, an attempt was made to change the words "bad tendency" to "motive," on one hand, and on the other to make truth a defense and to leave all questions to the jury for determination. The fight, therefore, here in America was primarily addressed to the "bad tendency" rule and was accentuated by the attempt to substitute "motive" for "bad tendency" by the Alien and Sedition Law.

All that we have said here is expounded upon by Prof. Schofield in an article referred to with approval by this

Court in *Thornhill* v. *Alabama*, 310 U. S. 88, and appearing in 9 Proc. American Sociol. Soc., beginning at page 79. Prof. Schofield concludes that the true definition of freedom of speech and freedom of the press in connection with public libels as it existed at the time of the adoption of the First Amendment, is as follows:

> "The true view of the original declarations of liberty of the press would appear to be, then, that they wiped out the English common law test of supposed bad tendency as to opinion makers, and substituted the test of the truth as a dividing line between lawful and unlawful publications on matters of public concern. . . ."

Therefore, the American definition of freedom of speech placed emphasis on truth, and "the greater the truth the greater the libel" never has been a part of the American concept. The law of private libel as it exists today is essentially the same as it existed at the time of the adoption of the Constitution. Private libels were always punishable as a crime; or the one libeled had redress in the courts always available to him by the common law. Truth was always a defense, regardless of tendency or motives. (See Schofield, "Freedom of the Press in the United States," 9 Proc. American Sociol. Soc.)

Therefore, we respectfully submit that the First Amendment from an historical point of view cannot be said to include, under a definition of "public questions," the dissemination of information concerning the facts of a labor dispute. This definition might be included by enlarging legislation of the Congress and made applicable to both the federal government and to the states as well. It should not be enlarged by the Courts. We further urge that the defendants cannot properly maintain that the state court decree operates as a previous restraint because

they are seeking the constitutional protection not only in furtherance of an unlawful objective but for the purpose of speaking and publishing falsehoods and untruths.

We also call attention to a statement appearing in defendants' brief (p. 36) wherein it is asserted that the Fifth as well as the Fourteenth Amendment protects the liberty of freedom of speech. Such a statement defies all underlying principles of constitutional or statutory construction. Protection of the First Amendment cannot be said to be included within the Fifth because it is a recognized principle of constitutional construction that different parts of an organic document cannot be construed as covering the same ground. If the framers of the Bill of Rights Amendments had intended that the restraints of the First Amendment should be included within the restraints of the Fifth Amendment, they certainly would not have presented the First Amendment for adoption as a separate and distinct Amendment. (See Mott, "The Process of Law", 1925 Ed. p. 276; Payne, "The Constitution of the United States," p. 45; Warren, "The New Liberty under the Fourteenth Amendment," 39 Har. Law Rev. p. 431.) We do not wish to be understood as calling attention to this statement merely for the purposes of criticism. Reference thereto is made solely for the purpose of forestalling any further attempt, hereafter, to urge that the protection sought is included in the Fifth Amendment restraints; and therefore that because the Fifth Amendment does not provide for specific restraints on any particular branch of the federal government, that the absorptive process can be said to be thus unlimited in scope.

III.

THE FOURTEENTH AMENDMENT GUARANTEE OF PROTECTION OF FREEDOM OF SPEECH DOES NOT PROTECT THE USE OF FORCE.

By paragraphs (e), (f) and (g) of the injunctional order, the defendants are enjoined and restrained from violence, threats and intimidation. It must be presumed that these restraining provisions of the decree are based upon the facts; otherwise, the Court in entering the decree would not have been impelled to include these restraining provisions in the decree. (See Br. pp. 6-8.)

The complaint here charged threats, intimidation and the fostering, aiding and abetting of a secondary boycott. The defendants on the second appeal (the writ of error proceedings) in the Supreme Court of Illinois, conceded that the issues in the second case were fully settled and determined in the first appeal, to-wit: the opinion of the Supreme Court found in the record (Rec. p. 24) was rendered and filed on the first appeal. Therefore, it ill behooves them in this Court and at this time to contend that there should or can be any differentiation between the issues on the first appeal and the issues on the second appeal.

It will be recalled that the first appeal was taken from an order dismissing the complaint on application of the defendants to dissolve the preliminary injunction; the second review was sought from the final decree entered in the Appellate Court. Therefore, we reiterate that all presumptions are indulged in, in favor of findings of fact having been made by the Court entering the decree (although not expressed in the decree) and which were the basis for the entering of each and every clause of the injunctional order.

It is asserted by the defendants in their brief that the statements contained in the complaint to the effect that the legends on the banners carried by the pickets were libelous and maliciously made, was a conclusion of the pleader and that it was so found by the Supreme Court of Illinois. Mention was made thereof by the Supreme Court of Illinois, but that court said: "The very fact that the employer and all of his employees joined in this suit sufficiently established it," viz.: that the banners contained untrue statements which were maliciously made. The statement with reference to the conclusion of the pleader is confined by th Court to the word "malice."

The record here amply demonstrates that the legends on the banners were both untrue and maliciously made. The following facts appear from the complaint: (a) that the employer was willing to enter into a closed shop agreement and so told the union officials when they called upon him in the month of April, 1937. His position was, that if his employees would become members of the trade union he would be willing to operate a closed shop. (b) The employer permitted the union organizers to speak to his employees and solicit membership on the business premises. (c) It was not until the employees refused to join the union and the union officials insisted that he enter into contractual relationships with the union and then threatened to call a strike unless he agreed either to force his employees to sign applications for membership or employ union members and discharge his present employees, that the employer refused to sign the closed shop agreement. Therefore, it clearly appears from the pleaded facts that the statements appearing on the banners to the effect that the employer would not permit collective bargaining and was unfair to union labor and the trade unions in question, were clearly untrue statements and maliciously made as part of a strike campaign in order to damage and

injure the employer as well as the employees. Such libelous statements were intentionally made as part of a campaign in which the ultimate objective was unlawful. The finding of malice is amply supported, both by the record and the substantive law of the State of Illinois. (See *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377.)

The statement of the Supreme Court of Illinois to the effect that the campaign consisted of accomplished libels and continuing trespasses and as part of a campaign of force, is also amply supported by the record. This is particularly emphasized by the fact that in plaintiffs' complaint it appears that two customers were threatened by pickets (Rec. p. 6). In addition thereto, the complaint sets up facts from which it may be rightfully assumed that the charge of the complaint that the defendants were aiding and abetting a secondary boycott was true (Rec. p. 11).

It appearing to the Supreme Court of Illinois that these acts of threat and intimidation actually took place, the Court said, in referring to the use of force and the use of the boycott brought about by the signs and banners, "To whatever extent these rules are violated we have lawlessness, and under such circumstances a court of equity will not pick and choose among the unlawful acts and threats, but will enjoin the whole scheme" (Rec. p. 28). Therefore, the Supreme Court of Illinois took the position that the entire campaign was one in which threats, intimidation and libels were a part, and would not pick and choose but would treat all of the means on the same basis. (See also *Am. Steel Foundries* v. *Tri-City Council*, 257 U. S. 184.)

This pronouncement being the last enunuciation of the substantive law of the State Court and in the case at bar, we submit that this statement of law must prevail over any statement which may be found in the opinion of that

court in the case of *Fenske* v. *Upholsterers Union,* 358 Ill. 239, quoted from in the defendants' brief on page 16. Certainly this statement of law must have binding force and effect in this case. This statement of state substantive law is binding upon this Court. (*Senn* v. *Tile Layers Union,* 301 U. S. 468; *Erie* v. *Tompkins,* 304 U. S. 64.)

Therefore, we have in this case the actual use of force in addition to unlawfulness of the objective. The use of force has always been condemned by this Court; for it has been said by this Court:

> "The constitutional guarantee of free speech does not protect a man from an injunction against uttering words that have all the effect of force."

(*Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 418; *Aikens* v. *Wisconsin,* 195 Wis. 193; *Near* v. *Minnesota,* 283 U. S. 697; *Senn* v. *Tile Layers Union,* 301 U. S. 468.)

No complaint is made here as to the remedy provided for under the laws of the State of Illinois. The Supreme Court of Illinois has stated in its opinion that a court of chancery had the power and jurisdiction to hear the case and to grant injunctional relief. It certainly cannot be said that the relief granted has no relationship to or is unreasonable when examined in connection with the evil sought to be protected against. This Court has always said that the due process clause of the Fourteenth Amendment does not undertake to regulate or control the power of a State to determine by what process legal rights may be ascertained or what remedy shall be provided for to protect and enforce legal rights. (*Honeyman* v. *Hanan,* 302 U. S. 575.)

CONCLUSION.

Defendants in their brief (pp. 14 to 22) call attention to the fact that there is a contrariety of policy in the several States, both by the decisions of the courts under the substantive law and by legislation passed by the legislative assemblies. They say that there should be one national policy, and they ask this Court to declare such policy by a decision and opinion in this case. The best answer to this argument is found in the words of Mr. Justice Holmes in his dissenting opinion in *Truax* v. *Corrigan*, 257 U. S. 312, at p. 344:

> ". . . There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. . . ."

Respectfully submitted,

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